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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1189

WILSON & CO., INC., A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PAUL WARE,
Counsel for Petitioner.

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To the Honorable Justices of the Supreme Court of the United States:

The petition of Wilson & Co., Inc., petitioner in the above captioned case, respectfully shows:

Statement of the Matter Involved.

An order of the National Labor Relations Board (hereinafter called the "Board") under Sections 8 (1) and (2) of the National Labor Relations Act (hereinafter called the "Act") has been enforced against petitioner by a decree of the Seventh Circuit Court of Appeals.

The opinion of the Seventh Circuit Court of Appeals is reported in 126 F. (2d) 114 and appears in the Record at pages 1550-1554.

The decision and order of the Board appears in the Record at pages 1509-1531.

The Board's order adversely affects Wilson & Co., Inc., petitioner, at its meat packing plant at the Union Stock Yards, Chicago, Illinois, and the rights guaranteed to approximately 3600 of its employees under the Act.

Petitioner is ordered to cease and desist from dominating or interfering with the administration of, and contributing financial or other support to, (1) the former Joint Representative Committee Plan and the Joint Representative Committee established thereunder, which were found to have "terminated on December 15, 1936"; (2) the current unaffiliated labor organization known as the Wilson Employees' Representation Plan and the Employees' Representative Committee established thereunder; and (3) any other labor organization of its employees.

The Board's order also requires petitioner to cease recognizing and to disestablish completely the Employees' Representation Plan and the Committee as the collective bargaining agency of its employees.

The order in broad language further requires petitioner to cease interfering with all rights covered in Section 7 of the Act and to post notices of compliance.

The Board dismissed allegations of the complaint charging that petitioner questioned its employees as to their union activities, warned them not to become affiliated with outside unions and not to vote for the C. I. O. Union in the Board-conducted election, and that it threatened to close its plant if the C. I. O. Union won that election.

The charge (R. 1437) was filed by Local Union No. 25, United Packinghouse Workers of America, of P. W. O. C.,

affiliated with the C. I. O. (herein called the "C. I. O. Union").

A study of this voluminous record such as was made by the Seventh Circuit Court of Appeals can only justify its conclusion that "shocking injustices" are disclosed. The Circuit Court of Appeals, however, erroneously enforced the Board's order, although clearly it would not have done so had it not adopted a rule "that evidence which would not appeal to any normal rational appraiser of the truth, may yet fall within the field of 'some evidence' " (126 F. (2d) at 117) which it inadvertently believed was the construction by this Court placed upon the substantial evidence rule in *National Labor Relations Board* v. *Automotive Maintenance Co.*, decided February 16, 1942, 62 Sup. Ct. 608; *National Labor Relations Board* v. *Foote Bros. Gear & Machine Corp.* (1940), 311 U. S. 620; and *National Labor Relations Board* v. *Link-Belt Co.* (1941), 311 U. S. 584.

This Court has uniformly held that substantial evidence is essential to support an order of the Board. Evidence which amounts to no more than a scintilla, which does no more than create a suspicion of the fact to be established, and which a reasonable mind would not accept as adequate to support the Board's conclusion, such as that in this case, is not substantial evidence. The rule applied by the Seventh Circuit Court of Appeals not only nullifies the review provisions of Section 10 (f) of the Act, but is in direct conflict with the substantial evidence rule announced by this Court in *National Labor Relations Board* v. *Columbia Enameling & Stamping Co.* (1939), 306 U. S. 292, 299-300.

Another fundamental issue presented to the Seventh Circuit Court of Appeals was that the court in equity and good conscience should not enforce the Board's order. It was shown that this proceeding was not commenced or prosecuted for the purpose of preventing or correcting alleged unfair labor practices, but was instituted and prose-

cuted for the sole purpose of eliminating a rival labor organization of the C. I. O. Union after the usual and lawful administrative proceedings [a Board-conducted election (R. 1042-1055)] had failed.

One of the defenses (R. 1445-1448) tendered to the complaint (R. 1439) presented this issue and was urged at the hearing (R. 6-7, 20, 66) before the Board (R. 1503-1506), and in the Circuit Court of Appeals (R. 1539-1541). The Trial Examiner (R. 1480) and the Board (R. 1510-1511) rejected this issue, denied (R. 489) petitioner's application for *subpoenas* and *subpoenas duces tecum* (R. 1458-1462), denied (R. 9) a motion to produce books and papers (R. 1457-1458), refused to admit offered evidence, refused to consider evidence admitted, and refused (R. 489) to consider a competent written offer of proof (R. 1468-1473),[1] all of which established beyond question petitioner's defense.

The Board has obtained enforcement of an order which destroys the rights guaranteed to 3600 employees under the Act; which disregards completely the stipulation by the Board, the C. I. O. Union and the Employees' Representative Committee that both unions were "labor organizations" within the meaning of the Act, that each claimed the right to represent petitioner's employees, and that an election was desired (R. 999-1000, 1030, 1031); and which ignores its finding (R. 1035) and order directing an election in which the names of each union should appear on the ballot (R. 1033-1040). The stipulation and order were made with full knowledge of all the facts concerning the forma-

[1] At the request of the Trial Examiner (R. 65, 147) petitioner introduced, without objection, its written offer of proof which was received in evidence as its Exhibit No. 3 (R. 150). At the conclusion of the hearing it was understood by the Trial Examiner and attorney for petitioner that the written offer was to be considered as a formal offer of proof (R. 757-758).

tion and operation of the Employees' Representation Plan and the Committee which are the basis of the Board's disestablishment order (R. 1468-1473).

The petitioner urges that under all of the circumstances in this proceeding, the Seventh Circuit Court of Appeals should have passed upon this question of law and exercised its equitable powers by denying enforcement of an order of an administrative agency of the United States which enters the Court with unclean hands to seek enforcement of its order that is arbitrary and capricious, and that was entered after a display of conduct which is not "in accordance with the cherished judicial tradition embodying the basic concept of fair play."

The complaint alleges that because of allegations in paragraphs 6 and 7, petitioner violated Section 8 (2) of the Act (R. 1441), and that by allegations in paragraphs 6, 7 and 9, petitioner violated Sections 7 and 8 (1) of the Act (R. 1441-1442). As to Section 7, the allegations of paragraph 9 of the complaint were dismissed (R. 1531) and petitioner was found guilty of the alleged violations of Section 8 (2) and the technical resulting violation of Section 8 (1).

Nevertheless, petitioner was ordered in the broad language of paragraph 1 (c) (R. 1530), to cease and desist from in any other manner restraining, coercing or interfering with the rights of its employees as guaranteed in Section 7 of the Act. Petitioner is further ordered, in paragraph 2 (c) (R. 1530-1531), to announce to the world that it has violated Section 7 and subsections (1) through (5) of Section 8 when all of such violations were not alleged in the complaint and not justified under the circumstances in this case by the order.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered February 19, 1942 and a peti-

tion for rehearing was filed March 6, 1942, which was denied March 25, 1942. The jurisdiction of this Court is invoked under Section 10 (f) of the National Labor Relations Act and Section 240 (a) of the Judicial Code, as amended.

Statute Involved.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449-457) are printed in the Appendix.

Questions Presented.

The following questions are presented:

1. Whether the Seventh Circuit Court of Appeals erred in assuming that it was bound to enforce the order against petitioner because there was "some evidence" to support the Board's findings, when, at the same time it expressly recognized that the evidence in the record overwhelmingly opposed the Board's findings and "would not appeal to any normal, rational appraiser of the truth."

2. Whether there is substantial evidence to support the Board's order.

3. Whether, under the circumstances in this proceeding, the Seventh Circuit Court of Appeals erred in refusing to exercise its review and equity powers to deny enforcement of the Board's order, or remand the proceedings for further hearing before the Board.

4. Whether the Seventh Circuit Court of Appeals erred in enforcing the broad provisions of paragraphs 1 (c) and 2 (c) of the Board's order.

Reasons for Granting the Writ.

1. The decision of the court below enforcing the order of the Board is squarely in conflict with the decision of this Court in *National Labor Relations Board* v. *Columbian*

Enameling & Stamping Co. (1939) 306 U. S. 292, 299-300, wherein it was held that such orders must be supported by "substantial evidence."

While the court below recognized that the evidence herein "would not appeal to any normal, rational appraiser of the truth" and "would not be sufficient to sustain a finding in any ordinary civil suit" and that "the findings were so overwhelmingly opposed by the evidence" as to require them to be set aside, yet it assumed, contrary to the *Columbian Enameling* case, that because there was "some evidence," even though not "substantial," to support the order of the Board, the court was bound to enforce the order.

2. The decision of the court below is based upon a wholly erroneous construction of its equitable jurisdiction to review orders of the Board under Section 10 (e) and (f) of the Act and is in direct conflict with the decision of this Court in *Ford Motor Co.* v. *National Labor Relations Board* (1939) 305 U. S. 364, 373. The court below has erroneously failed to correct abuses of power by this administrative agency in the performance of its *quasi*-judicial function when that agency did not "accredit" itself "by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play" in conflict with the decision of this Court in *Morgan* v. *United States* (1938) 304 U. S. 1, 22.

3. The decision of the court below in refusing to recognize petitioner's defense, that this proceeding was commenced and prosecuted solely for the purpose of eliminating the labor organization which defeated the Board-sponsored C. I. O. Union in a fair election conducted by the Board, and that it was not commenced or prosecuted for the purpose of preventing and correcting alleged unfair labor practices, is squarely in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Na-*

tional Labor Relations Board v. *Indiana-Michigan Electric Co.* (1941) 124 F. (2d) 50, 56. In the latter proceeding the court remanded it to the Board with directions to hear and consider the additional evidence in support of a similar defense. Furthermore, in refusing to permit petitioner to prove its defense or consider evidence admitted, the court has approved an order in which the Board has failed to consider facts and circumstances which ought to have been considered, contrary to the Fifth Amendment to the Constitution.

Moreover, the decision of the court below is contrary to the result reached by the Board and the Circuit Court of Appeals for the Tenth Circuit in *Magnolia Petroleum Co.* v. *National Labor Relations Board* (1940) 115 F. (2d) 1007 where the Board refused to disestablish an unaffiliated union wherever it had been accepted as an election rival by the nationally affiliated charging union.

Consequently, not only has petitioner been deprived of due process, but also the rights of 3600 employees guaranteed under Section 7 of the Act have been brushed aside by the Board in professing to effectuate the policies of the Act contrary to the decision of this Court in *Consolidated Edison Co., etc.* v. *National Labor Relations Board* (1938) 305 U. S. 197, 238.

4. The decision of the court below in enforcing the broad provisions of paragraphs 1 (c) and 2 (c) of the Board's order prohibiting acts not charged in the complaint, is, under the circumstances in this record, squarely in conflict with the decision of this Court in *National Labor Relations Board* v. *Express Publishing Co.* (1941) 312 U. S. 426.

5. The conflicts between the decisions aforementioned and the instant one should be resolved by this Court. Unless they are resolved, employers such as petitioner will be subject to the whims and caprice of administrative fiat.

Conclusion.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record in proceedings herein; and that the decree of said Circuit Court of Appeals be reversed by this Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

PAUL WARE,
Counsel for Petitioner.

April, 1942.

APPENDIX.

Section 1 of the National Labor Relations Act of July 5, 1935 (Chapter 372, 49 Stat. 449) provides as follows:

"The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 2 (5) of that Act provides:

"When used in this Act—

* * * * * * *

"(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Section 7 of that Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 8 of that Act provides:

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be pro-

hibited from permitting employees to confer with him during working hours without loss of time or pay.

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

"(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

Section 10 (e), (f) and (h) of that Act provides:

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the

court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been

engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

• • • • • • •

"(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115)."

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Sec. 7 12

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1189

WILSON & CO., INC., A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1550–1554) is reported in 126 F. (2d) 114. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1508–1531) are reported in 31 N. L. R. B., No. 69.

JURISDICTION

The decree of the court below (R. 1564–1566) was entered on April 4, 1942. A petition for rehearing filed by petitioner (R. 1555) was denied on March 25, 1942 (R. 1556). The petition for a writ of certiorari was filed on April 28, 1942.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's findings that petitioner dominated, interfered with, and supported successive labor organizations of its employees in violation of Section 8 (1) and (2) of the Act.

2. Whether, in the circumstances of this case, the Board's action in holding an election in proceedings under Section 9 of the Act barred it from prosecuting subsequent unfair labor practice charges under Section 10.

3. Whether the Board's cease and desist order is unduly broad in light of the Board's findings.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

After the filing of charges and amended charges in May and August 1940 by Local Union No. 25, United Packinghouse Workers of America of PWOC, affiliated with CIO, herein called the Union (R. 1435–1439), and after the issuance of a complaint by the Board on August 29, 1940 (R. 1439–1443), and after the other usual pro-

ceedings, the Board issued its findings of fact, conclusions of law, and order (R. 1508–1531). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

From 1921 until December 1936, petitioner maintained an employees' representation plan called the Joint Representative Committee Plan (R. 1513–1516, 1523; 766–771). The Plan contained provisions for control by a committee composed of an equal number of employee and management representatives, thereby enabling petitioner to block any action of which it disapproved (R. 1514, 1515; 766, 769); the committee's "permanent impartial chairman" and "permanent impartial secretary" were appointed by petitioner (R. 1514, 1515; 769); the committee's function concerning wages, hours, and working conditions was limited to making "recommendations" (R. 1514; 766, 770–771). There was no provision for payment of dues, for general employee meetings, or for membership, and all employees of one month's standing were automatically entitled to vote for representatives (R. 1513, 1514–1515, 1520; 32, 222, 767). Petitioner bore all the expenses of the organization, furnished company facilities for operation of the Plan, and paid employee representatives for time

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

spent on Plan business (R. 1513–1514, 1515; 24, 32, 252, 742, 743, 768, 769). Petitioner held an absolute veto power over amendments to the Plan (R. 1515–1516; 771).

In December 1936, the employee representatives under the Joint Representative Committee Plan substituted therefor a plan known as Wilson Employes' Representation Plan; petitioner's Manager of Industrial Relations assisted, and the management representatives under the old plan participated, in the transformation (R. 1517–1518, 1524; 223–224, 252, 691, 694–696, 773–779). The new Plan recited that it was "approved by the management" (R. 1518; 773). For a considerable period after its creation, the new Plan was administered by the old employee representatives who retained office without a new election (R. 1518, 1521, 1524; 37, 779). The new Plan was essentially like the old Plan; while there was no formal provision for management representatives on the governing committee, management representatives in fact continued to attend and to participate in the committee meetings, and they also edited its minutes (R. 1518, 1520, 1524–1525; 49, 59, 92–94, 808–872). As before, no provision was made for dues, for general employee meetings, or for membership, and all employees of petitioner automatically were entitled to vote for representatives (R. 1518, 1520, 1522; 40, 641, 773–779). Also as before, petitioner defrayed all expenses of the Plan, supplied company facilities for the

operation of the Plan, and paid employee representatives for time spent on Plan business and, on occasion, even when it knew that the representatives were merely pretending to be occupied with Plan business (R. 1518–1520, 1521–1523, 1525; 38–40, 44–45, 50, 60, 81, 225, 229–230, 253, 259, 260–261, 399–400, 402–404, 406–407, 409–410, 415, 637–640, 739–741). When the Plan retained an attorney, it chose one suggested by petitioner (R. 1522; 69, 230–231, 257, 453–455). The new Plan, like the old, granted petitioner full veto power over amendments to the Plan (R. 1520, 1522, 1525; 777).

The Board found and concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. 1516, 1526, 1529–1530). In so holding, the Board rejected (R. 1510–1511) a defense offered by petitioner that the Board was precluded from proceeding with the instant case because on January 26, 1940, prior to the filing of the charges by the Union and the issuance of the complaint by the Board, the Board had conducted an election in a representation proceeding under Section 9 of the Act in which the Plan committee as well as the Union were permitted to appear upon the ballot and in which the Plan committee obtained a majority of the votes cast (R. 1033–1055). The election, however, did not result in certification of the Plan committee by the Board because in the

interim the Union had filed its charges of unfair labor practices (R. 1510).

The Board in its decision found not only that petitioner had violated Section 8 (1) and (2) of the Act but that the violations were of such duration and character as to disclose an underlying purpose to defeat self-organization and its objects and to indicate the probability that the interrelated guarantee of Section 7 would be violated in the future unless restrained (R. 1528–1529).

The Board's order required petitioner to cease and desist from its unfair labor practices and from in any manner infringing the rights guaranteed in Section 7; to disestablish and refuse recognition to the Plans and to the committees established thereunder; and to post appropriate notices (R. 1530–1531).

On May 6, 1941, petitioner filed in the court below a petition to review and set aside the Board's order (R. 1534–1542, 1548). The Board answered, requesting enforcement of the order (R. 1543–1547). On February 19, 1942, the court handed down its opinion enforcing the Board's order (R. 1550–1554). On March 25, 1942, a petition for rehearing filed by petitioner was denied (R. 1555–1556). A decree of enforcement was entered on April 4, 1942 (R. 1564–1566).

ARGUMENT

1. The evidence, summarized above (pp. 3–5), clearly warranted the Board's findings that the

company engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act. Cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241. This evidence is plainly substantial and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229. And whatever the language of the court below in the course of its observations concerning other cases, it appears that it found in this case not "some" but "substantial" evidence.[2]

2. Petitioner urges (Pet. 7–8, 3–5) that the Board's order should have been denied enforcement because the instant proceeding was instituted not "for the purpose of preventing and correcting alleged unfair labor practices" but "for the purpose of eliminating the labor organization which defeated the [Union]" in the Section 9 election conducted by the Board (see *supra*, p.

[2] With respect to the instant case, the Court declared that it was "fully convinced" that there was "evidence which sustains the finding that both local organizations had their origin and creation in petitioner's efforts; that both were somewhat dominated by petitioner and financed by it. Neither committee was an entirely free, uncontrolled agent, and neither was qualified to serve, adequately, the employees, as their collective bargaining agent" (R. 1553–1554).

5). It is apparently petitioner's position that because the Board allowed the Plan committee to participate in and appear on the ballot in the representation proceeding, it thereby adjudicated the validity of the Plan and the Board was thereafter barred from attacking the legality of the Plan in a subsequent unfair labor practice proceeding.

Petitioner's contention does not differ essentially from that urged in the petitions for certiorari in *Warehousemen's Union* v. *National Labor Relations Board,* and *McKesson & Robbins, Inc.* v. *National Labor Relations Board,* Nos. 627 and 628, this Term, certiorari denied, 314 U. S. 674. For the reasons stated in the Board's briefs in opposition in those cases, the contention is without merit. Petitioner's unfair labor practices clearly were not in issue in the representation proceeding. The purpose, procedure, issues, and effect of a representation case under Section 9 of the Act are wholly different from those of an unfair labor practice case under Section 10. The former involves only a fact-finding inquiry into the identity of representatives for subsequent collective bargaining; the latter seeks to remedy unfair labor practices if found to have been committed, and to prevent their repetition. *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401, 405, 409. There is nothing in the Act which prescribes the order in which proceedings under

Sections 9 and 10 of the Act, respectively, must be conducted, or which requires the Board to withhold an election in a representation case pending the possible filing of charges and issuance of a complaint in an unfair labor practice case involving the same employer. Until charges were filed the Board could not have issued a complaint (Section 10 (b); cf. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 368–369); when, following the election, charges were filed, the Board acted within its clear statutory authority and discretion (Section 10 (a), (b), (c)) in issuing the complaint.[3]

3. Petitioner attacks (Pet. 6, 8) the provision of the order which restrains petitioner from in any manner infringing the rights guaranteed in Section 7 of the Act as invalid under the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426. However, as appears from the Statement (*supra,* pp. 3–5), the Board's findings, supported by substantial evidence, reveal that petitioner dominated and interfered in a multitude of ways with the administration of its employees' labor organization for over two decades, and that when such interference became illegal in 1935, petitioner nevertheless con-

[3] *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 124 F. (2d) 50 (C. C. A. 6), certiorari granted May 25, 1942, No. 1137, this term, and *Magnolia Petroleum Co.* v. *National Labor Relations Board,* 115 F. (2d) 1007 (C. C. A. 10) are plainly not in conflict. The former is not in point, while the latter supports the Board's position in this case.

tinued, and is still continuing, its illegal activities without substantial change. In the *Express* case, this Court recognized that "the breadth of the order * * * must depend upon the circumstances of each case" (312 U. S., at 436); and it pointed out (at pp. 433, 434–435) that the Board had made no finding upon the facts of that case as to any probable relationship between the unfair labor practices committed and other possible types of unfair labor practices. In the instant case, on the other hand, the Board, citing the *Express* case (R. 1529n), specifically found that the unfair labor practices which had been committed were "persuasively related to the other unfair labor practices proscribed and that danger of their commission in the future is to be anticipated from the course of the [petitioner's] conduct in the past" (R. 1529).

The making of such findings and the formulation of appropriate orders are entrusted by the Act to the expert judgment of the Board. Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194. The Board's judgment was properly exercised in the circumstances of this case. In any event petitioner's contention, insofar as it challenges the particular exercise of judgment, clearly presents no question of general importance. Provisions like

the one here in controversy were enforced in *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, No. 188, this Term, decided February 16, 1942; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, No. 588, this Term, decided March 30, 1942; and *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, No. 774, this Term, decided April 27, 1942. A contention similar to that raised by petitioner was raised by the employer in *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, No. 985, this Term, certiorari denied April 6, 1942.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decisions nor any question of general importance. The petition should, therefore, be denied.

Respectfully submitted.

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MAY 1942.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * *

SEC. 9. * * *

(*c*) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the

Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10. (*a*) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(*b*) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *

(*c*) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay,

as will effectuate the policies of this Act. * * *

* * * * *

(*e*) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(*f*) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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